

Indemnification for FMLA and ADA administration - are employers really protected?

New challenges may lead to increased outsourcing - the role of the employer vs. the administrator

The Family and Medical Leave Act (FMLA) and the Americans with Disabilities Act (ADA) laws can be complex, especially when state-specific requirements and the chance of a related disability claim are added to the mix. Given the complexities of these laws, and the risk of noncompliance (which can result in costly litigation and the potential for fines on top of awards to employees), it's no surprise many employers choose to outsource the management of these programs to expert third-party administrators (TPAs). By outsourcing management of FMLA and ADA programs, employers can relieve themselves of the burdens of employing in-house experts to manage claims, which may be infrequent depending on the size of the company.

However, outsourcing the management of these programs doesn't mean the employer is exempt from compliance with the laws to ensure employees are treated fairly and consistently. An open line of communication with the TPA managing the program can help

ensure that claim decisions are made appropriately and in the best interests of the employer and their employees. Employers should expect their chosen vendor partner to clearly outline the specific services they will provide and what responsibilities remain with the employer.



As part of the agreement between an employer and the TPA, to administer the employer's FMLA and ADA programs, the TPA may indemnify, or hold harmless, the employer from liability and expenses that may directly arise from the TPA's actions as part of the services it provides. To put it simply, indemnification is a contractual obligation for the TPA to repay the employer for loss or damage that may occur as a result of the TPA's negligence or willful misconduct.

What's the risk of noncompliance?

Many employers mistakenly believe indemnification protects them against any claims that arise, regardless of whether the TPA or the employer made an error.

This is not the case and employers should take the time to fully understand their role in the partnership they establish with their TPA.

managed and resolved within the DOL's own investigative process. The statistics also don't illustrate the costs associated with defending against these claims – even claims that are deemed invalid often result in some legal fees for the employer due to the investigative process within the DOL.

Noncompliance with the ADA laws can also present a significant risk to employers.

According to the Department of Labor (DOL), in 2015 there were¹



1,419
FMLA-related complaints



672 of which were deemed “valid” cases filed against employers that resulted in



\$1,960,257
being collected in back wages.

According to the Equal Employment Opportunity Commission (EEOC), in 2015²,



61 ADA suits
were resolved
for a total of



\$6.2
million dollars.

These statistics don't include cases that were moved to federal or state courts to be litigated – only those

And again – this doesn't take into consideration those complaints that moved on to state/federal courts for litigation or the defense costs incurred by employers in answering these complaints.

The relationship between a TPA and an employer

With enforcement action and lawsuits on the rise, many companies partner with outside administrators – even though employers who opt to go this route may be confused about how outsourcing may protect them.

Typically, administrators indemnify employers for occurrences that result from the TPA's action, failure or omission. But what does this really mean? Essentially, the employer is protected against the TPA making a mistake that results in damages to the employer. They are not protected if the TPA, for example, denies a claim that should have been approved because inaccurate/incomplete information was provided by the employer, or if the employer denied an employee access to apply for leave or ADA accommodations. It's important for employers to remember that the purchase of administrative services is not an insurance policy that covers the employer's errors or omissions. The employer, not the TPA, makes employment decisions around whether or not to terminate or accommodate an employee, both of which could lead to a lawsuit or a complaint. Using a TPA is not a replacement for carefully gathering all of the facts and seeking advice of legal counsel *before* making an adverse employment decision.



Employers must ensure they have solid policies in place that establish how leaves of absence and requests for accommodations are handled.

Employers must properly train managers and ensure a system is in place to facilitate awareness of, and compliance with, internal policies designed to keep the company in compliance with these laws. Employees should know where to find these policies and what their responsibilities are. Furthermore, human resource professionals should continue to stay abreast of changes to laws and potential risk issues within their workplace.

To some employers, the peace of mind they have knowing the TPA they work with has a high level of expertise in ensuring compliance with the FMLA and ADA, and the value they can add in reducing absence and improving productivity, is worth the cost of outsourcing, but it does not exempt them from actively participating in ensuring their company is compliant.

Understanding the scope of indemnification and the role the employer must play

Companies that have chosen to outsource the management of their FMLA and ADA administration should look at their contract carefully to be sure that they fully understand the scope of their recourse in the event the TPA mismanages a claim. Depending on the carrier, the language around which instances are covered under the indemnification clause and which ones are not may vary. When reviewing a contract with a TPA, employers should be certain that there are no obvious gaps that might put them at undo risk.



Employers should also be wary of TPAs who imply the indemnification clause will protect against all claims, regardless of fault.



Outsourcing FMLA and ADA management to a TPA should provide a certain peace of mind – employers have a right to feel confident that their TPA partner has their back and will work to protect them should a claim arise. However, employers must play an active role in complying with laws – otherwise they may be at risk for a costly lawsuit that may not be protected through the TPA’s indemnification clause.

1. ADA.gov, “Information and Technical Assistance on the Americans with Disabilities Act.” Accessed October 2016.
2. U.S. EEOC, “EEOC Litigation Statistics, FY 1997 through FY 2015.” Accessed October 2016.



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